

86 - 1073

No. _____

Supreme Court, U.S.

FILED

DEC 24 1986

JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

GREAT COMMONWEALTH LIFE
INSURANCE COMPANY, *et al.*,

Petitioners,

v.

BRANCH BANK & TRUST COMPANY, *et al.*,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

MOORE & PETERSON, P.C.
2800 First City Center
Dallas, Texas 75201
(214) 754-4800
George R. Poehner
William F. LePage

WOMBLE, CARLYLE,
SANDRIDGE & RICE
Suites 2400 and 2500
301 N. Main Street
Winston-Salem, North
Carolina 27102
(919) 721-3600
Jimmy H. Barnhill

Attorneys for Petitioners

49 PR

QUESTIONS PRESENTED FOR REVIEW

1. Whether a person violates Securities and Exchange Commission Rule 10b-13 by entering into a contract to purchase stock in the target corporation before commencing the tender offer when the parties to the contract do not fully perform their obligations before the tender offer is commenced.

2. Whether the Seventh Amendment to the United States Constitution requires a United States District Judge receiving a special verdict to review apparently conflicting answers to special interrogatories in light of the instructions as a whole in an attempt to resolve the apparent conflict and, if that attempt is successful, to enter judgment in accordance with the answers as reconciled.

3. Whether the Trial Court erred in permitting a judgment against the defendants for common law fraud to stand in the face of overwhelming evidence in favor of the defendants on the element of full disclosure of material facts.

4. Whether the Trial Court erred in awarding a class of minority shareholders damages based upon the price paid per share for control of the target corporation.

PARTIES TO THE PROCEEDING

Plaintiffs

Branch Bank & Trust Company, formerly known as City National Bank, executor of the estate of John S. Cansler, deceased; Nell V. Bates; Anne Pender Griffith; Virginia T. Johnson; Lacy D. Keesler; S. Dewey Keesler; A. H. Kimball; H. Brown Kimball; Ann Dupree King; Rose Dupree King, deceased; John D. King; Marie Dowd Latimer; T. F. Morgan; Grace E. Morgan; Mary Rogers Pender Murphy; Ludie B. Parker; John Robert Pender, III; John Robert Pender, IV; Mary D. Pender; Deborah Grace Speece; Oliver Brown Thomas; Charles Nixon White; Doris Haire White; and Rogers Pender Williams, individually and as representatives of a class of persons who sold stock of All American Assurance Company to Great Commonwealth Life Insurance Company in a tender offer in December 1979 and January 1980.

Defendants

American Commonwealth Financial Corporation; Great Commonwealth Life Insurance Company; I.C.H. Corporation; and Robert T. Shaw.

The list of parties to the proceedings below is identical to the list of parties to this proceeding.

Affiliates

The following corporations are direct or indirect partially owned subsidiaries of petitioner I.C.H. Corporation: Integrity National Life Insurance Company, Western Assurance Corporation, The Western Life Assurance Company, and Constitution Life Insurance Company.

TABLE OF CONTENTS

	<u>Page</u>
Questions Presented for Review	i
Parties to the Proceeding.....	ii
Official Reports Below	vi
Jurisdiction	1
Constitutional Provision and Regulation Involved	2
Statement of the Case	2
Reasons for Granting the Writ.....	4
I. The decision below conflicts with decisions of other courts of appeals regarding when a stock purchase transaction occurs under the Uniform Commercial Code and federal law and will, if not reversed, severely impair the ability of prospective tender offerors to make private purchases prior to commencing a tender offer, contrary to the intent of Congress and the Securities and Exchange Commission.....	4
II. The decision below deprives the petitioners of their right to judgment upon the verdict of the jury in violation of the Seventh Amendment to the United States Constitution, and conflicts with this Court's decision in <i>Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.</i> , and with decisions of other Courts of Appeals.....	12
Conclusion.....	20
Appendix	A-1 to A-22
I. Opinion of the United States District Court for the Western District of North Carolina..	A-1
II. Opinion of the United States Court of Appeals for the Fourth Circuit	A-12
III. Seventh Amendment to the Constitution	A-21
IV. Rule 10b-13 of the Securities and Exchange Commission, 17 C.F.R. § 240.10b-13	A-21

TABLE OF AUTHORITIES

	<u>Page</u>
<i>Cases:</i>	
<i>Abrahamson v. Fleschner</i> , 568 F.2d 862 (2d Cir. 1977), cert. denied, 436 U.S. 913 (1978)	10
<i>Abrams v. Oppenheimer Government Securities, Inc.</i> , 737 F.2d 582 (7th Cir. 1984)	9
<i>Affiliated Ute Citizens of Utah v. United States</i> , 406 U.S. 128 (1972)	14
<i>Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.</i> , 369 U.S. 355 (1962)	13,14,20
<i>Breur v. Industrial Steel Container Co.</i> , 599 F.2d 115 (Minn. Sup. Ct. 1975)	8
<i>Fugitt v. Jones</i> , 549 F.2d 1001 (5th Cir. 1977)	14,20
<i>Gallick v. Baltimore & Ohio Ry. Co.</i> , 372 U.S. 109 (1963)	15,17,19,20
<i>Great Commonwealth Life Insurance Co. v. Branch Bank & Trust Co.</i> , 801 F.2d 714 (4th Cir. 1986)	6,18,vi
<i>Griffin v. Matherne</i> , 471 F.2d 911 (5th Cir. 1973)	15,18
<i>Hayden Stone, Inc. v. Brode</i> , 508 F.2d 895 (7th Cir. 1974)	7,8,12
<i>Heine v. The Signal Companies</i> , [1976-77 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,898 (S.D.N.Y. 1977)	12
<i>Hewitt v. Paine, Webber, Jackson & Curtis</i> , 6 U.C.C. Rep. 388 (N.Y. Sup. Ct. 1969)	8
<i>International Central Corp. v. Vesco</i> , 490 F.2d 1334 (2d Cir. 1974)	10
<i>Jones v. Central States Inv. Co.</i> , 654 P.2d 727 (Wyo. Sup. Ct. 1982)	8
<i>Klaxon Co. v. Staton Electric Mfg. Co.</i> , 313 U.S. 487 (1940)	6
<i>McVey v. Phillips Petroleum Co.</i> , 288 F.2d 53 (5th Cir. 1961)	15,19,20
<i>Mashpee Tribe v. New Seabury Corp.</i> , 592 F.2d 575 (1st Cir. 1979)	14,20
<i>Miller v. Royal Netherlands Steamship Co.</i> , 508 F.2d 1103 (5th Cir. 1975)	15,17
<i>In re Paragon Securities Co.</i> , 599 F.2d 551 (3d Cir. 1979)	8,12
<i>Phillips v. Zimmering</i> , 285 So. 2d 233 (Fla. App. 1973) ..	8
<i>Ragsdale v. Kennedy</i> , 209 S.E.2d 494 (1974)	14,17
<i>Rathborne v. Rathborne</i> , 683 F.2d 914 (5th Cir. 1982) ...	10
<i>Shores v. Sklar</i> , 647 F.2d 462 (5th Cir.) (en banc), cert. denied, 459 U.S. 1102 (1981)	14

<i>Sunshine Mining Co. v. Great Western United Corp.</i> , [1977-78 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,049 (D. Idaho 1977)	11
---	----

<i>Tennessee Carolina Transportation, Inc. v. Stuck</i> , 243 N.C. 423, 196 S.E.2d 711 (1973)	7
--	---

<i>Weiss v. Dempsey-Tegelan & Co.</i> , 443 S.W.2d 934 (Tex. Civ. App. — Amarillo 1969).....	7
---	---

CONSTITUTION:

U.S. Const. amend. VII	2,A-21
------------------------------	--------

STATUTES AND REGULATIONS:

17 C.F.R. § 240.10b-5	3
-----------------------------	---

17 C.F.R. § 240.10b-13	2,A-21
------------------------------	--------

17 C.F.R. § 240.13d-3(a)(2)	9
-----------------------------------	---

17 C.F.R. § 240.13d-5(a)	9
--------------------------------	---

Fed. R. Civ. P. 49(a)	18
-----------------------------	----

North Carolina Unfair and Deceptive Trade Acts or Practices Act, N.C. Gen. Stat. Chap. 75.....	3
---	---

15 U.S. § 78aa	3
----------------------	---

15 U.S.C. §§ 78a <i>et seq.</i>	8
---------------------------------------	---

15 U.S.C. § 78c(a)(13)	9
------------------------------	---

28 U.S.C. § 1254(1)	1
---------------------------	---

4 Tex. Bus. & Comm. Code § 8.301(a)	7
---	---

4 Tex. Bus. & Comm. Code § 8.302(4)	7
---	---

4 Tex. Bus. & Comm. § 8.313(a).....	7
-------------------------------------	---

MISCELLANEOUS:

Aranow, Einhorn, & Bernstein; <i>Developments in Tender Offers for Corporate Counsel</i>	12
--	----

W. T. Grimm & Co., <i>Mergerstat Review</i> 1985 (1986).....	10,11
--	-------

W. Prosser, <i>The Law of Torts</i> § 180 (5th ed. 1984)	14
--	----

Restatement (Second) of Torts § 548 (1977)	14
--	----

SEC Release No. 34-8712 [1969-70 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 77,745 at 83,709	11
---	----

OFFICIAL REPORTS BELOW

The opinion of the United States District Court for the Western District of North Carolina is not reported, but is reprinted in the appendix hereto, p. A-1 *infra*. The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 801 F.2d 714 (4th Cir. 1986), and is reprinted in the appendix hereto, p. A-12 *infra*.

No. _____

IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

GREAT COMMONWEALTH LIFE
INSURANCE COMPANY, *et al.*,

Petitioners,

v.

BRANCH BANK & TRUST COMPANY, *et al.*,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

The petitioners Great Commonwealth Life Insurance Company, American Commonwealth Financial Corporation, I.C.H. Corporation, and Robert T. Shaw respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above-styled proceeding on September 25, 1986.

GROUND ON WHICH JURISDICTION IS INVOKED

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on September 25, 1986. The petitioners did not seek a rehearing of the decision of the Court of Appeals. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND REGULATIONS INVOLVED

The Constitutional provision and regulations involved are the Seventh Amendment to the United States Constitution and Rule 10b-13 of the Securities and Exchange Commission, 17 C.F.R. § 240.10b-13. They are reprinted in the appendix hereto, at pp. A-21-22, respectively.

STATEMENT OF THE CASE

The petitioners are corporations and an individual involved in the life insurance business. Over the years they have also been involved in acquiring life insurance companies. This action arises out of a part of one such acquisition.

On September 13, 1978, American Commonwealth Financial Corporation ("ACFC") entered into a contract for the purchase of 1,011,610 shares of All American Assurance Company ("AAA") stock from American Bank & Trust Company ("ABT") and providing for the settlement of certain litigation between ACFC and ABT. The transaction closed on January 5, 1979. As of February 1, 1979, ACFC transferred all of its AAA stock to its wholly-owned subsidiary, Great Commonwealth Life Insurance Company ("GCL").

In early December 1979, management of GCL determined that, if GCL increased its holdings in AAA to 80% or more by January 5, 1980 (the first anniversary of ACFC's first acquisition of AAA stock), certain tax advantages might be available to GCL. In December 1979, AAA had outstanding 1,506,795 shares, of which GCL's 1,011,610 shares represented approximately 70%. To increase its ownership of AAA stock to 80%, GCL had to acquire approximately 194,000 shares.

GCL initially purchased 57,782 shares of AAA stock for \$5.00 per share in privately negotiated transactions. Of the 57,782 shares, GCL purchased 18,500 from three trusts, the

Judy Post Trust No. 3, the John Post Trust No. 3, and the Jane Post Pfeffer Trust No. 4 (the "Post Trusts"). The stock purchase contract called for delivery of endorsed stock certificates to GCL and payment by GCL to the Post Trusts of five percent of the purchase price on December 12, 1979, with the balance of the purchase price payable on January 2, 1980. The transaction closed on December 12, 1979, with the Post Trusts delivering the endorsed certificates to GCL. Two days later, on December 14, 1979, GCL publicly announced and mailed materials for its offer to purchase, at \$5.00 cash per share, up to 175,000 shares of AAA stock. The tender offer expired on January 4, 1980, with 171,900 shares having been tendered.

The respondents and the class they represent sold their AAA stock to GCL in the tender offer and, on August 18, 1982, sued the petitioners for alleged improprieties in connection with the tender offer. The respondents asserted federal jurisdiction under 15 U.S.C. § 78aa. Specifically, the respondents contended that the purchase of AAA stock from the Post Trusts violated Rule 10b-13 and that the tender offer materials violated Rule 10b-5, 17 C.F.R. § 240.10b-5, North Carolina common law, and the North Carolina Unfair and Deceptive Trade Acts or Practices Act, N.C. Gen. Stat. Chap. 75, by misrepresenting certain facts concerning AAA and failing to disclose others. The jury found in favor of the petitioners on the respondents' Rule 10b-5 claim, but against the petitioners on the claims under Rule 10b-13 and North Carolina common law. The District Court held the North Carolina Unfair and Deceptive Trade Acts or Practices Act inapplicable to the transactions involved in this case, entered judgment on the jury's findings, and subsequently overruled the petitioners' motion for judgment notwithstanding the verdict. The Court of Appeals affirmed the District Court's rulings.

REASONS FOR GRANTING THE WRIT

- I. The decision below conflicts with decisions of other courts of appeals regarding when a stock purchase transaction occurs under the Uniform Commercial Code and federal law and will, if not reversed, severely impair the ability of prospective tender offerors to make private purchases prior to commencing a tender offer, contrary to the intent of Congress and the Securities and Exchange Commission.

The Court of Appeals affirmed a jury finding of a violation of Rule 10b-13, resulting from a private purchase that was clearly negotiated before the commencement of the tender offer, at the same price as offered in the tender offer, but for which all or part of the purchase price was not paid until after the commencement of the tender offer. That decision conflicts with decisions of other courts of appeals, controlling Texas law, the Uniform Commercial Code as enacted by all the States, is inconsistent with federal law prescribing when a purchase of stock occurs under Section 10(b) of the Securities Exchange Act, and, if not reversed, would expand the effect of Rule 10b-13 far beyond that intended by Congress or the Securities and Exchange Commission.

The evidence is uncontradicted that the Post Trusts delivered endorsed stock certificates to GCL on December 12, 1979. The evidence is in conflict regarding when payment for the shares was made and when the tender offer was mailed to the minority shareholders. There is, however, no evidence that the mailing occurred before December 12.

The District Court viewed the petitioners' argument in favor of their motion for judgment notwithstanding the verdict respecting the respondents' Rule 10b-13 claim as raising the question whether there was substantial evidence to support the jury's conclusion. The District Court completely ignored the petitioners' argument that, under controlling federal and Texas

law, the timing of the delivery of the endorsed certificates determines when the purchase of the stock occurred, and that accordingly, as a matter of law, the petitioners did not violate Rule 10b-13.

The District Court responded to the substantial evidence question by pointing to circumstantial evidence as the potential basis for the jury's apparent discrediting of the testimony of one witness, Richard P. Catalano, the investment advisor to the Post Trusts, who testified that the endorsed stock certificates were delivered to GCL on December 12. That circumstantial evidence only suggested the possibilities that (1) the down payment of five percent of the purchase price was paid on or after December 17 rather than on December 12, as provided in the stock purchase agreement between the Post Trusts and GCL, and (2) the tender offer materials were mailed to the minority shareholders perhaps as early as December 12. Even if the jury chose to disregard entirely Mr. Catalano's testimony and to read the circumstantial evidence in the light most favorable to the respondents, the earliest date it could have concluded, based on the evidence, that the tender offer materials were mailed was December 12. In addition to Mr. Catalano's testimony, Mr. C. Fred Rice, the president of GCL, testified that the stock certificates were delivered to GCL on December 12, 1979. (App. 655-656). There was no evidence, direct or circumstantial, of later delivery.

The Court of Appeals relied upon the circumstantial evidence that the District Court cited in affirming the judgment on the Rule 10b-13 issue. It responded to the petitioners' argument that delivery of the endorsed certificates, under controlling federal and Texas law, determined when the purchase occurred by noting that the five percent down payment was possibly delayed until three or more days after the commencement of the tender offer and speculating that the reason for the possible delay was that the endorsed certificates were not actually delivered at the time provided by the stock

purchase agreement between the Post Trusts and GCL. There was no evidence whatever to support that speculation.¹

The petitioners also argued to the Court of Appeals that the purchase of the Post Trust stock did not violate Rule 10b-13 because, under federal securities law, GCL became the beneficial owner of the stock on the date the stock purchase agreement was executed, December 11, 1979. The Court of Appeals rejected that argument, saying "[i]t is the purchase of stock that Rule 10b-13 regulates, not the claim to beneficial ownership." 801 F.2d 717. GCL's claim to beneficial ownership of the AAA stock, however, arose only as a result of GCL's status as a purchaser.

The Court of Appeals also said that the possible delay in making the down payment "raised the issue whether the parties intended to transfer ownership of the stock on December 12 or at the time Great Commonwealth made the initial payment" 801 F.2d at 717, and ruled that the District Court properly submitted that issue to the jury,² *id.* In so ruling the Court of Appeals improperly focused upon when GCL gave consideration to its seller, the Post Trusts, to determine when the purchase occurred, rather than upon the transfer of the certificates, as it was required to do.

The Courts below were required to apply North Carolina choice of law rules in determining when the purchase from the Post Trusts occurred. *Klaxon Co. v. Staton Electric Mfg. Co.*,

¹ The Court of Appeals said that in the absence of an explanation for the possible delay in payment, "the jury could draw the reasonable inference that a prudent lawyer would not direct his client to pay for stock until the shares were in hand." 801 F.2d at 717. That inference does not, however, lead to the further conclusion that the shares were delivered late. It leads only to the conclusion that the shares were delivered sometime before December 17.

² The District Court did *not* submit any issue of the parties' intent concerning when the transfer of ownership was to occur to the jury. The special interrogatories do not mention the parties' intent (App., 39-43); nor do the instructions concerning the Rule 10b-13 claim (App., 888-892).

313 U.S. 487, 496-97 (1940). North Carolina courts would look to Texas substantive law.³ *Tennessee Carolina Transportation, Inc. v. Stuck*, 243 N.C. 423, 196 S.E.2d 711 (1973). Texas law provides that upon transfer of the AAA stock to GCL, GCL acquired whatever rights the Post Trusts had to the stock.⁴ 4 Tex. Bus. & Comm. Code § 8.301(a) (Vernon Supp. 1986). Transfer of the security to GCL occurred when GCL acquired possession of the endorsed certificates. 4 Tex. Bus. & Comm. Code § 8.313(a) (Vernon Supp. 1986). The date that GCL made its down payment is irrelevant to the question when the purchase of the stock occurred. The purchase occurred when GCL acquired the Post Trusts' rights in the stock, and that occurred when GCL received the endorsed certificates, on December 12. *Weiss v. Dempsey-Tegelan & Co.*, 443 S.W.2d 934 (Tex. Civ. App. — Amarillo 1969).

The focus of Texas law on when the certificates were transferred for the answer to the question when a purchase of stock is made, is similarly required by the law of all 50 of the states, as well as the District of Columbia and the Virgin Islands. Sections 8.301 and 8.313 of the Texas Business and Commerce Code are part of chapter eight of the Uniform Commercial Code, which has been adopted, virtually unchanged, by all of those jurisdictions. The state and federal courts, with the exception of the Court of Appeals below, that have considered the question when stock was purchased have, since the adoption of the Uniform Commercial Code, focused upon the act of transferring the certificates, and have not referred to the timing of payment for the securities. *E.g.*, *Hayden Stone, Inc. v. Brode*, 508 F.2d 895 (7th Cir. 1974);

³ GCL was a Texas corporation with its principal place of business in Texas. The Post Trusts were Texas trusts, the contract was performed in Texas (P. Ex. 20, § 3.A; App., p. 970), and the parties agreed that Texas law governed the transaction (P. Ex. 20, § 3.B; App., p. 971).

⁴ Except for fraud or illegality to which GCL was a party or adverse claims of which it had notice, 4 Tex. Bus. & Comm. Code § 8.302(4) (Vernon Supp. 1986), matters that are not at issue here.

Phillips v. Zimmering, 284 So.2d 233 (Fla. App. 1973); *Breuer v. Industrial Steel Container Co.*, 228 N.W.2d 115 (Minn. Sup. Ct. 1975); *In re Paragon Securities Co.*, 599 F.2d 551 (3d Cir. 1979); *Hewitt v. Paine, Webber, Jackson & Curtis*, 6 U.C.C. Rep. 388 (N.Y. Sup. Ct. 1969); *Jones v. Central States Inv. Co.*, 654 P.2d 727 (Wyo. Sup. Ct. 1982). In particular, two cases demonstrate that whether consideration has passed from the buyer to the seller is irrelevant and that occurrence of "transfer" or "delivery"⁵ is determinative of whether and when a purchase occurred. In *Hayden Stone, Inc. v. Brode*, 508 F.2d 895 (7th Cir. 1974), the United States Court of Appeals for the Seventh Circuit held, under the Illinois version of section 8-313 of the Uniform Commercial Code (which is identical to Texas' version), that a purchase had occurred upon transfer of the certificates even though the buyer had not paid the purchase price. *Id.* at 896-97. In *In re Paragon Securities Co.*, 599 F.2d 551 (3d Cir. 1979), the United States Court of Appeals for the Third Circuit held, under the New Jersey version of section 8-313 of the Uniform Commercial Code (also identical to Texas' version), that a purchase had not occurred because there was no transfer of the certificates, even though the buyer had paid the entire purchase price. *Id.* at 554-56. Under the views of both the Court of Appeals for the Third and Seventh Circuits, the dispositive issue in determining whether and when a purchase has occurred is whether and when "transfer" or "delivery" was made. If transfer or delivery was made, there was a purchase even if the buyer did not pay. If there was no transfer or delivery, there was no purchase even if the buyer did pay. The decision of the Court of Appeals below conflicts with those decisions.

The decision of the Court of Appeals also conflicts with the provisions of the Securities Exchange Act, 15 U.S.C. §§ 78a *et seq.*, and with decisions of other Courts of Appeals interpreting

⁵ "Delivery" was the term used in the pre-1977 version of section 8-313 of the Uniform Commercial Code; "Transfer" replaced it in the 1977 amendments. For purposes of this litigation, the terms are equivalents.

that Act as to the scope of the anti-fraud provisions. The Securities Exchange Act provides in its definitional section that:

The terms 'buy' and 'purchase' each include any contract to buy, purchase or otherwise acquire.

15 U.S.C. § 78c(a)(13) (1981). The regulations regarding the reporting requirements of § 13 of the Act are consistent with this definition, providing that a person becomes a beneficial owner of a security through entering into a contract which includes "the power to dispose, or to direct the disposition of, such security." 17 C.F.R. § 240.13d-3(a)(2) (1986). GCL clearly had the right to dispose of, or to direct the disposition of, the Post Trusts' AAA stock from and after December 11, 1979, when the stock purchase agreement was executed. GCL therefore purchased the stock on that date.

Further, GCL became the beneficial owner of the Post Trusts' AAA stock when the stock purchase contract was executed, and was deemed to have acquired those securities on that date for the purposes of section 13 of the Act. *Id.* § 240.13d-5(a). Therefore, the Court of Appeals' focus of the date of payment as the determinative factor under Rule 10b-13 is in direct conflict with the language of the statute under which the Rule was promulgated and with other regulations promulgated under that Act.

In addition, the focus of the Court of Appeals upon the transfer of consideration conflicts with decisions from other Courts of Appeal. For example:

It is well established that a contract to purchase and sell securities constitutes a purchase or sale of the securities for the purposes of the securities laws.

Abrams v. Oppenheimer Government Securities, Inc., 737 F.2d 582, 587 (7th Cir. 1984) (neither delivery nor the passing of title to the contracted for securities is required for the transaction to be considered a "sale"). In determining when a "purchase" has occurred for the purposes of the anti-fraud

provisions, the courts generally focus upon whether there has been a significant change in the nature of the purchaser's investment or in the investment risk. *Abrahamson v. Fleschner*, 568 F.2d 862, 868 (2d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978). The purchaser's investment is complete, and a significant change has occurred, when a binding agreement to purchase the shares is made. Two separate Courts of Appeal have therefore stated that the payment of the consideration is not a necessary element of a statutory purchase under Rule 10b-5. *Rathborne v. Rathborne*, 683 F.2d 914, 920 (5th Cir. 1982); *International Control Corp. v. Vesco*, 490 F.2d 1334, 1346 (2d Cir. 1974). The narrow focus of the Court below upon the passing of consideration conflicts in principle with this otherwise pervasive concept under the Securities Exchange Act that a purchase of securities occurs when a party first has the right to direct the transfer or acquire the possession of those securities.

Finally, permitting the decision of the Court of Appeals below to stand would place an unwarranted restriction upon the ability of prospective tender offerors to make either open market or private purchases before commencing the tender offer. For example, if the determination of when the purported pre-tender offer purchase occurred is dependent upon when the purchase price was paid, no prudent tender offeror would make a private purchase on an installment basis unless the last installment payment was paid prior to the commencement of the tender offer, lest he find himself in violation of Rule 10b-13.

That this concern is significant is indicated by the increasing importance of tender offers as a device for acquiring corporate control. In the 12-year period, 1974 through 1985, there were 865 attempts to acquire control of publicly traded corporations in the United States through tender offers. W. T. Grimm & Co., *Mergerstat Review* 1985, 108 (1986). In 1985 alone, there were 84 such attempts, of which 32 were contested or "hostile" *Id.* Those 32 hostile tender offers in 1985 involved

an aggregate purchase price offer of more than 40 billion dollars. *Id.* at 112-14. Indeed, if the rule adopted by the Court of Appeals below remains the law, it causes a heretofore legitimate pre-tender private purchase to violate Rule 10b-13. In *Sunshine Mining Co. v. Great Western United Corp.*, [1977-78 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,049 (D. Idaho 1977), the tender offeror made a private purchase before commencing the tender offer but made payment with unsecured promissory notes payable more than three years later. *Id.* at 91,718. If the date of payment controls when the purchase occurred for Rule 10b-13 purposes, the *Sunshine Mining* transaction would not pass scrutiny.

Using Rule 10b-13 to outlaw transactions such as those involved in this case or in *Sunshine Mining*, *supra*, is not necessary, would not effectuate the purpose of the Securities and Exchange Commission in adopting Rule 10b-13, and would expand the preclusive effect of Rule 10b-13 far beyond its intended boundaries. The use of Rule 10b-13 to invalidate pre-tender purchases that are devices to mislead tendering shareholders into believing that the offering price is fair is unnecessary because the shareholders have recourse to the anti-fraud and anti-manipulation rules promulgated by the Securities and Exchange Commission, such as Rule 10b-5. SEC Release No. 34-8712 [1969-70 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 77,745 (1970) at 83,709. The respondents availed themselves of those rules and lost.

Moreover, the Security and Exchange Commission's purposes in adopting Rule 10b-13 were: (1) to protect tendering shareholders from discrimination as a result of their being unable to withdraw their shares to take advantage of higher prices being made available to other sellers by the tender offeror outside the tender offer; (2) to protect tendering shareholders from having the number of shares they sell in the tender offer reduced as a result of the tender offeror being able to negotiate private purchases at prices lower than that offered in the tender offer; and (3) to protect the tender offeror from

pressure by large shareholders hoping to secure a premium price. *Heine v. The Signal Companies*, [1976-77 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,898 (S.D.N.Y. 1977). None of those objectives would be promoted by the lower Court's expansion of Rule 10b-13's preclusive effect: the price paid to the Post Trusts was exactly the same as was offered in the tender offer, all shares tendered were purchased, and the Post Trust's holdings were not large.

The action of the Court below effectively integrates what was clearly a completely negotiated pre-tender private purchase into the subsequent tender offer merely because an infinitesimal portion of the purchase price was not paid before the tender offer commenced. Such integration is the appropriate province of Congress, not of the courts or the Securities and Exchange Commission, and Congress has not yet expressed or even indicated its support for it. Aranow, Einhorn & Bernstein; *Developments in Tender Offers for Corporate Control*, p 20 (1977).

The decision below respecting the respondents' Rule 10b-13 claim conflicts with decisions of the United States Courts of Appeals for the Third and Seventh Circuits in *In re Paragon Securities Co.*, 559 F.2d 551 (3d Cir. 1979), and *Hayden Stone, Inc. v. Brode*, 508 F.2d 895, conflicts with the decisions of the highest courts of the states that have had occasion to consider section 8-313 of the Uniform Commercial Code, which has been adopted by all fifty states, the District of Columbia, and the Virgin Islands, conflicts with federal law concerning when a purchase of stock is made for purposes of section 10(b) of the Securities Exchange Act, and unwarrantedly expands the effect of Rule 10b-13 far beyond that intended by Congress or the Securities and Exchange Commission. A writ of certiorari should issue to review and correct the decision of the court below.

- II. The decision below deprives the petitioners of their right to judgment upon the verdict of the jury in violation of the

Seventh Amendment to the United States Constitution, and conflicts with this Court's decision in *Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, and with the decisions of other Courts of Appeals.

The decision of the Court of Appeals, in not requiring an attempt to resolve apparently conflicting answers by the jury to special interrogatories and, if the attempt is successful, entry of judgment for the petitioners in accordance with the verdict as thereby resolved, wrongfully deprived the petitioners of their right to judgment upon the verdict of the jury in violation of the Seventh Amendment to the United States Constitution.

The jury concluded that the petitioners did not violate Rule 10b-5 because disclosure of the material facts found to have been omitted from the tender offer materials would not have had actual significance to a reasonable shareholder in deciding whether to tender his shares of AAA stock. Read in the light of the District Court's instructions and the placement of the burden of proof in an omissions case, that conclusion means that the petitioners established that the respondents did not rely upon the tender offer materials in deciding to tender their shares.

The jury also concluded that the petitioners "defrauded and deceived" the respondents when there was a relationship of trust and confidence between the petitioners and the respondents. This conclusion was the basis for the District Court's judgment that the respondents had committed an act of constructive fraud in violation of North Carolina common law.

The jury's findings apparently conflict with one another. Thirteen special interrogatories were submitted to the jury. The first five related to the respondents' claim under Rule 10b-5, the second three related to the claim under Rule 10b-13, the third three related to the claim of constructive fraud under North Carolina common law, and the last two related to the amount

of damages. In their answers to the first five special interrogatories the jury found that the petitioners did not violate Rule 10b-5 because the respondents did not rely on the tender offer materials in deciding to sell their stock.⁶ Reliance is, of course, an essential element of a fraud case, whether the claim for relief is created by statute and regulation, *Shores v. Sklar*, 647 F.2d 462, 468 (5th Cir.) (en banc), cert. denied, 459 U.S. 1102 (1981), or it is created by the common law, Restatement (Second) of Torts § 548 (1977); W. Prosser, *The Law of Torts* § 108 (5th ed. 1984). Indeed, the North Carolina Supreme Court has consistently held that reliance is an essential element in a constructive fraud case arising under that state's common law. *Ragsdale v. Kennedy*, 209 S.E.2d 494 (1974). Nevertheless, the jury, in spite of its finding of a lack of reliance, found that the petitioners "defrauded" the respondents in connection with the tender offer, in violation of North Carolina common law. The apparent conflict is obvious: if there was no reliance by the respondents, there was no violation of either Rule 10b-5 or North Carolina law.

In the face of such an apparent conflict the Seventh Amendment requires the Court of Appeals to search for an interpretation of the jury's answers that will resolve the conflict and, if the search is successful, to order entry of judgment in accordance with the jury's resolved answers. *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355 (1962); *Fugitt v. Jones*, 549 F.2d 1001 (5th Cir. 1977); *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1st Cir. 1979). When an apparent conflict exists, the Court of Appeals, with due regard for the importance of the constitutional imperative it is fulfilling, must look to the evidence adduced at trial, the District Court's charge to the jury, and the arguments of counsel to ascertain the meaning of the jury's answers and to reconcile

⁶ The petitioners had the burden of proof on the issue of reliance because the Rule 10b-5 case was submitted as an omissions case and, under this Court's ruling in *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972), the defendants have the burden of proving a lack of reliance in an omissions case.

them, if possible. *McVey v. Phillips Petroleum Co.*, 288 F.2d 53 (5th Cir. 1961); *Griffin v. Matherne*, 471 F.2d 911 (5th Cir. 1973); *Miller v. Royal Netherlands Steamship Co.*, 508 F.2d 1103 (5th Cir. 1975). The United States Court of Appeals for the Fifth Circuit states its obligation under these circumstances to view the jury's apparently conflicting answers in light of the "totality of circumstances," *Miller v. Royal Netherlands Steamship Co.*, 508 F.2d 1103, 1107 (5th Cir. 1975), to determine "whether the answers may fairly be said to represent a logical and probable decision on the relevant issues as submitted." *Griffin v. Matherne*, 471 F.2d 911, 915 (5th Cir. 1973). The Fifth Circuit's view of its duty is directly responsive to this Court's mandate in its statement that when an appellate court faces apparently conflicting answers to special interrogatories, it "must attempt to reconcile the jury's findings, by exegesis if necessary . . .," before remanding for a new trial. *Gallick v. Baltimore & Ohio Ry. Co.*, 372 U.S. 108, 119 (1963).

Resort to the District Court's instructions concerning the special interrogatories reveals that, in fact, the jury's answers do not conflict, but that they require entry of judgment for the petitioners rather than for the respondents. Special interrogatory 3 asked the jury whether

... disclosure of the omitted material facts under the circumstances of this case [would] have had actual significance in the deliberations of a reasonable shareholder as to whether to sell his interest in All American Assurance Company? (App., 40)

The jury answered that interrogatory "No." *Id.*

The instructions to the jury concerning special interrogatory 3 reveal that it was the "reliance" interrogatory and, moreover, that the District Court placed the burden upon the petitioners, as the defendants, to prove the lack of reliance:

The third element of the plaintiffs' claim under Rule 10b-5 is a requirement of truth (sic) by a preponderance of the evidence that the plaintiffs relied upon the alleged omissions, and that they were justified in doing so. Now, in the

case of omissions or non-disclosures of material facts, if such an omission is proved by the plaintiffs by a preponderance of the evidence . . . then the element of reliance on the part of the plaintiffs may be presumed. The law infers that the plaintiffs would have relied upon facts which are shown to be material and intentionally withheld. The defendants, however, may rebut this presumption if they are able to produce evidence that even if the material facts had been disclosed, the plaintiffs' decision as to the transactions would not have been any different than what it was." (App., 886)

The jury's negative response to special interrogatory 3 could not have been the result of its conclusion that the plaintiffs failed to prove the omission of material facts or that such failure was intentional, because the jury found omission of material facts and intent by its affirmative responses to special interrogatories 1 and 2. Thus, it is clear that the jury's negative answer to special interrogatory 3 is a finding that the petitioners proved that the respondents did not rely upon the tender offer materials in deciding to tender their All American stock.

Special interrogatory 10 asked the jury whether "in connection with the purchase of the Plaintiffs' shares, was there any fraud or deceit upon the Plaintiffs by:

- (a) Robert T. Shaw?
- (b) GCL, ACFC, or ICH?" (App., 42)

The jury answered both subparts "Yes." (*Id.*).

The Instructions to the jury concerning special interrogatory 10 make it clear that, although the interrogatory contains the words "fraud" and "deceit," it was not asking about "fraud" or "deceit" in either the legal or the lay sense. Rather, in light of the instruction, the jury's affirmative answers to the interrogatory only mean that the petitioners did an act or omitted or concealed material facts and are not an affirmative finding of any of the other elements of common law constructive fraud under North Carolina law. The instruction concerning special interrogatory 10 first quotes the interrogatory, and then says: "Now, we've been over the definition of fraud

and deceit in connection with the Rule 10b-5 claim.” (App., 893). The definition of “fraud” given the jury in connection with the Rule 10b-5 claim was:

Fraud embraces the taking of undue or unconscionable advantage of another through breach of legal or equitable duty by acts, omissions or concealment of material facts. (App., 916)

This instruction, and thus the jury’s answer to special interrogatory 10, does not deal with several of the elements of common law constructive fraud as established by the North Carolina Supreme Court. In *Ragsdale, v. Kennedy*, 209 S.E.2d 494 (1974), the North Carolina Supreme Court articulated the elements of a constructive fraud case when there is a relationship of trust and confidence between the parties to a transaction. Those elements are: (1) the defendant made a misrepresentation or concealment of a material fact; (2) the misrepresentation or concealment was reasonably calculated to deceive; (3) the defendant knew the misrepresentation was false, or that the concealed information was of significance, or acted recklessly; (4) the defendant intended for the plaintiffs to rely upon the misrepresentations or concealments; (5) the plaintiff reasonably relied and acted upon the misrepresentations or concealments; and (6) the plaintiff was damaged as a result.

Reliance, the fifth element prescribed by the North Carolina Supreme Court for constructive fraud in a fiduciary relationship context, is not embraced by the District Court’s definition of “fraud” or “deceit.” Thus, the jury’s affirmative answer to special interrogatory 10 does not mean that the jury found all of the factual elements of constructive fraud that are required for entry of judgment against the petitioners.

Rule 49(a) of the Federal Rules of Civil Procedure, *Gallick v. Baltimore & Ohio Ry. Co.*, 372 U.S. 108 (1963), and *Miller v. Royal Netherlands Steamship Co.*, 508 F.2d 1003 (5th Cir. 1975), provide the procedure to be followed in cases such as this. The jury’s answers to other special interrogatories must

be reviewed, in light of the District Court's instructions, counsel's argument, and the evidentiary record, to determine whether there is a "logical and probable decision" on each factual element of common law constructive fraud. *Griffin v. Matherne*, 471 F.2d 911, 915 (5th Cir. 1973). If there is not, and no special interrogatory concerning any such issue was requested, Rule 49(a) provides that the Court "shall be deemed to have made a finding in accord with the judgment on the special verdict." Rule 49(a), F.R.C.P.

As to the element of reliance, there is, however, a specific jury finding, so that the deemed finding Rule 49(a) provides does not come into being. The jury found a lack of reliance in response to special interrogatory 3. That finding alone is sufficient to require entry of judgment in favor of the petitioners on the respondents' common law constructive fraud claim.

The Court below attempted to avoid this result by distinguishing between the respondents' claim under Rule 10b-5 and their common law constructive fraud claim. The attempted distinction focused upon the foundational acts specified in the special interrogatories. According to the Court below, the foundational acts for the Rule 10b-5 claim were alleged omissions in the tender offer materials. The Court of Appeals further speculated that the foundational act for the common law claim was "the purchase of the Post stock with the intent to create the false impression that \$5 was a reasonable price." 801 F.2d at 718. The District Court's reasoning was similar. *Infra* at A-6. Both the District Court and the Court of Appeals missed a very fundamental point, however, and that point renders their distinction meaningless. The purchase of the Post stock could not have created the false impression the Court of Appeals says was intended. The tender offer materials contained a description of the privately negotiated pre-tender purchases, which included the purchase of the Post stock, and those materials were the respondents' only source of information concerning those purchases. The jury, however, found that the

respondents did not rely upon the information disclosed in the tender offer materials in deciding to tender their stock. Not having relied upon the information in the tender offer materials to decide whether to tender their stock, the respondents, of necessity, did not rely upon the information those materials contained concerning the Post stock purchases, and could not have been under the impression, as a result of the description of those purchases, that five dollars per share was a desirable price. Therefore, the distinction drawn by the courts below is illusory. Judgment should have been entered for the petitioners on the petitioners' common law constructive fraud claim.

The jury's affirmative answers to special interrogatories 8 and 11, the proximate cause interrogatories, and its assessment of damages do not suggest that the jury reached a "logical and probable decision" against the petitioners on the liability issues respecting the North Carolina common law claim. It is elementary that absent findings for the plaintiff on all the liability elements, the plaintiff is not entitled to an award of damages. *McVey v. Phillips Petroleum Co.*, 288 F.2d 53, 59 (5th Cir. 1961). As in the *McVey* case, the jury's answers to the liability interrogatories, when read in light of the District Court's instructions, are "plain and unambiguous," *id.*, and require entry of judgment in the petitioner's favor.

Nor is the solution to the apparent conflict between the jury's answers a remand for retrial. "It is the duty of the court to reconcile or harmonize the answers with each other, if that can reasonably be done." *Id.* As this Court noted, remanding for a new trial because of an irreconcilable conflict in the jury's findings necessarily entails disregarding the jury's special verdict, an act the Seventh Amendment prohibits the courts from doing if the answers can be harmonized. *Gallick v. Baltimore & Ohio Ry. Co.*, 372 U.S. 108, 119 (1963). Since the jury's answers can be harmonized and, as harmonized, they are findings that the petitioners are not liable on the respondents' claims under either Rule 10b-5 or North Carolina common law, the proper remedy is remand for entry of judgment on those claims in the petitioners' favor.

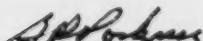
The decision below deprived the petitioners of their right to a jury trial as guaranteed by the Seventh Amendment, was contrary to this Court's decisions in *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355 (1966), and *Gallick v. Baltimore & Ohio Ry. Co.*, 372 U.S. 108 (1963), and conflicts, both directly and in principle, with decisions of the United States Courts of Appeals for the First and Fifth Circuits in *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1st Cir. 1979), *Fugitt v. Jones*, 549 F.2d 1001 (5th Cir. 1977), and *McVey v. Phillips Petroleum Co.*, 288 F.2d 53 (5th Cir. 1961). A writ of certiorari should issue to review and correct the decision below.

CONCLUSION

For these various reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

MOORE & PETERSON
A Professional Corporation
2800 First City Center
Dallas, Texas 75201-4621
(214) 754-4800

By: 

G. R. Poehner
William F. LePage

WOMBLE, CARLYLE,
SANDRIDGE & RICE
Jimmy H. Barnhill
Suites 2400 and 2500
Wachovia Building,
301 N. Main Street
Winston Salem, North Carolina
27102
(919) 721-3600

Attorneys For Petitioners

APPENDIX



IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

C-C-82-482-P

CITY NATIONAL BANK, as Executor
of the Estate and Trustee under the Will
of JOHN S. CANSLER, Deceased, et.
al.,

Plaintiffs,

vs.

AMERICAN COMMONWEALTH
FINANCIAL CORPORATION,
GREAT COMMONWEALTH LIFE
INSURANCE COMPANY and
ROBERT T. SHAW,

Defendants.

MEMORANDUM

Judgment for Plaintiffs having been entered by this Court, the Defendants have now moved for Judgment Notwithstanding the Verdict, or alternatively, for New Trial:

(1) To the jury's finding of liability under Securities Exchange Commission Rule 10b-13, on the ground that there was no substantial evidence of a purchase outside the tender offer after the time that offer was publicly announced or otherwise made known to the minority shareholders of All American Assurance Company. ("All American")

(2) On the jury's finding of a breach of fiduciary duties, on the grounds that there was no substantial evidence of trust and confidence in the Defendants and for the reason that the jury's finding of fraud and deceit in Issue No. 10 is inconsistent with its finding in Issue No. 3 that the average shareholder could not have reasonably

relied upon the omissions contained in the tender offer materials.

(3) With regard to both the Plaintiffs' Rule 10b-13 and fiduciary duties claims based upon the additional ground that there is no substantial evidence to support the jury's finding of damages.

RULE 10b-13

The Defendants' first contention is in essence that the purchase of the Post Stock did not violate the provisions of Rule 10b-13 because at the time of the purchase the tender offer was not "... publicly announced or otherwise made known by such persons to holders of the security to be acquired" The Defendants' argument is premised on the fact that the Post Trust stock purchase occurred one or two days prior to the announcement of the tender offer.

The Court agrees with the Defendants that as a matter of law pre-tender private purchases are not covered by Rule 10b-13 although they are still subject to the general anti-fraud provisions of the Securities Act. *Heine v. The Signal Companies*, [1976-77 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,898 (S.D.N.Y. 1977); SEC Release No. 8717 (the prohibition begins with the public announcement or other commencement of the offering, whichever is earlier.)

The Court in *Heine* elaborated upon the scope of events intended to be covered by Rule 10b-13 as follows:

Apparently because of the rule's focus on events taking place after a tender offer is actually announced the SEC explicitly exempted "[p]urchases made prior to the inception [of the offer]," though such purchases would still be subject to the general anti-fraud provisions of the Securities Act. See SEC Release No. 37-8712, *supra*.

Id. at 91,319 (brackets in original).

To hold that a pre-tender private purchase should be subject to Rule 10b-13 would be inconsistent with the various securities regulations. For instance, tender offerors are required to disclose their purchase of the subject security made within a specific period prior to the tender offer. *See, e.g.*, §§ 13(b) and 14(e) of the Securities Exchange Act. Requiring disclosure at the time a tender offer is sent to the public is also inconsistent with the contention that once a party decides it will make such an offer, any private purchase marks the inception of that tender offer. Further, to hold that disclosure of intent to make a tender offer triggers the Rule 10b-13 prohibitions against market purchases

... probably would cause the termination of all market purchases by a tender offeror as soon as the decision to make a tender offer had been reached. Because Congress certainly does not appear to have intended to affect market purchases in this manner, the Courts and the SEC should refrain from taking action to integrate market purchases of securities with related tender offers until Congress expresses its intent to support such integration.

Aranow, Einhorn & Berstein, *Developments in Tender Offers for Corporate Control*, p. 20 (1977). In light of the above, the Court is of the opinion that Rule 10b-13 prohibits tender offerors from purchasing shares of stock outside the tender offer *after*, and not before, the tender offer is publicly announced or commenced. *See, Heine v. The Signal Companies, supra*, at p. 91,319; SEC Release No. 8717.

In determining what constitutes the "public announcement" or "commencement" of the tender offer as those terms are utilized in Rule 10b-13 the Securities and Exchange Commission stated

As used in the rule an offer could be publicly announced or otherwise made known it [sic] the holders of the target security through a published advertisement, a news release or other communication by or for the persons making the offer to holders of the security being sought for cash tender or exchange.

SEC Release No. 8712.

Although the Court agrees with the legal premise that a pre-tender offer purchase is not subject to the prohibitions of Rule 10b-13, a disputed factual issue existed at the trial as to whether the Post Trust stock purchase occurred prior to, or after, the commencement of the tender offer. The jury was instructed that in order to find a violation of Rule 10b-13 the Plaintiffs needed to prove that the tender offer was outstanding (not anticipated) at the time the Post Trust stock was sold to the Defendants. The instructions provided:

No person who makes a cash tender offer or exchange offer — which we're not involved with — for any equity security — that is, stock — shall, directly or indirectly, purchase, or make any arrangement to purchase, any such security otherwise than pursuant to such tender offer or exchange offer, from the time such tender offer is publicly announced or otherwise made known by such person to holders of the security to be acquired until the expiration of the period, including any extensions thereof, during which the securities tendered pursuant to such tender offer or exchange offer may by the terms of such offer be accepted or rejected.

Now, there's a great deal of discussion about whether it was the twelfth or thirteen, [sic] I believe. Again, I'm speaking from my recollection. It's your recollection that counts. *There was a great deal of discussion about when Mr. Catalano* — and I've probably got that name wrong; I haven't pronounced it right yet — *sold the stock*. That's for you to determine.

So, if you feel that the *tender offer was outstanding at the time the stock was sold or arrangements were made for the sale of the stock to Mr. Catalano* — I'm not going to worry about the pronunciation of his name; you know who we're talking about — *if you feel that was made to him during that period — then, of course, you answer that issue, Yes; if you feel that it wasn't, you have to answer that issue, No*. Again, the burden is on the plaintiffs on all of these issues to persuade you by a preponderance of the evidence that these violations occurred. (Emphasis supplied.)

The jury answered the issue "Yes".

In that the jury was instructed to determine whether or not the Post Trust stock was a pre-tender offer purchase, the issue raised by the Defendants' motion is whether there is substantial evidence to properly support the jury's finding. See, *Brady v. Allstate Ins. Co.*, 683 F.2d 86, 89 (4th Cir. 1982); *Ralston Purina Co. v. Edmunds*, 241 F.2d 164 (4th Cir.) cert. denied, 353 U.S. 974 (1957); *Payne v. Blue Bell, Inc.*, 550 F.Supp. 1324, 1325 (M.D.N.C. 1982). The Court, after carefully considering the matter is of the opinion that there was sufficient evidence for the jury to find that the Post Trust stock purchase actually occurred after the tender offer had commenced.

The evidence as to when the tender offer commenced and when the Post Trust stock was sold to the Defendants consisted of various documents, circumstantial evidence, and the testimony of Richard P. Catalano at the trial and at his deposition.

Mr. Catalano testified in substance that he was aware that a tender offer to the shareholders would be made by Great Commonwealth Life Insurance Company ("GCL"), but that he never saw the tender offer until after he had transferred the Post Trust shares to GCL on December 12, 1979, when he received four or five thousand dollars, and a note from which he received eighty three thousand dollars on January 2, 1980. Mr. Catalano also testified that he sold in a private purchase instead of through the tender offer in order to expedite the receipt of the funds. The minority shareholders were also paid on January 2, 1980. He further testified that he thought he had asked one of the brokers he dealt with to procure a copy of the tender offer sometime after the tender offer was announced.

The jury evidently chose to discredit Mr. Catalano's testimony that the purchase occurred prior to the commencement of the tender offer. The fact that, according to Mr. Catalano's own testimony, he was aware GCL was going to make a tender offer

and he did not receive 95% of the purchase money until January 2, 1980, although he sold in order to expedite the receipt of the funds may be one of the reasons, known only to the jury, for discrediting his testimony. Further, a letter to GCL from its attorney indicates that even as of December 17, 1979 GCL had not paid any of the 5% allegedly paid at the time of the transfer. (Plaintiffs' Exhibit 22). These facts coupled with the existing business relationship between Mr. Shaw and Mr. Post, and Mr. Shaw's initiation of the purchase of the Post Trust Stock in the midst of preparation of the tender offer¹ is circumstantial evidence on which the jury could reasonably rely on to reject Mr. Catalano's testimony that the stock was transferred prior to the tender offer.

Furthermore, there was the pivotal unanswered question of "Why?" Why would the Defendants solicit the Post Trust stock from Mr. Catalano, allegedly one or two days before the tender offer? Why would the Defendants solicit the stock if it were not for the purpose of manipulating the price of the shares being purchased under the tender offer by establishing a recent purchase of 1% of the outstanding shares at a price of \$5.00 per share and including that purchase at that price on page 14 of the tender offer? Mr. Shaw never appeared or testified at the trial, and the Defendants never really addressed the question and an explanation was never offered. The only evidence was that Mr. Shaw sought out Mr. Catalano, a resident of the same town, Dallas, Texas and asked him to sell the Post Trust stock to the Defendants. The jury determined that this was in order to influence the Plaintiffs to sell their shares under the tender offer also at \$5.00 per share. This was a question of fact which the jury answered in the Plaintiff's favor.

In addition, the jury had before it the contradiction of the dates in the documentary evidence surrounding the tender

¹ According to the Defendants the Post Trust stock purchase occurred two days before the tender offer was announced.

offer, which documents were prepared for or by the Defendants. To recapitulate the documentary evidence as to the publication of the tender offer, it appears from the minutes of the special meeting of the Board of Directors of GCL held on December 11, 1979 that "[t]he Chairman displayed a copy of a proposed letter from Great Commonwealth to All American Assurance Company to be dated December 12, 1979 advising the Board of Directors of All American Assurance Company of Great Commonwealth's intention to make a public offer to purchase up to 175,000 shares of the issued and outstanding common stock of All American Assurance Company for \$5.00 net cash per share to the Sellers" (Plaintiffs' Exhibit 148).

The dates in the documents, however, are inconsistent. There was a letter to the All American shareholders dated December 12, 1979 from Robert T. Shaw as President of All American. In the December 12, 1979 letter the shareholders are advised that "[b]y letter dated December 13, 1979, the Board of Directors of All American were advised by Great Commonwealth Life Insurance Company ("GCL") of its intention to make an offer to purchase up to 175,000 shares of All American Common Stock (the "Shares") for \$5.00 per share" (Plaintiffs' Exhibit 5).

According to the Plaintiffs' Exhibit 5 the meeting of the Board of Directors of All American was held on December 13, 1979 at the Sheraton Inn in Charlotte, North Carolina. The minutes reflect that the Directors were presented with a copy of a letter from GCL dated December 21, 1979 advising the Board of Directors of All American of GCL's intention to make a public offer to purchase 175,000 shares of All American's common stock for \$5.00 net cash per share. According to the minutes, the entire letter was read to the Directors of All American, and attached to the minutes as Exhibit "A". The letter attached to the minutes as Exhibit "A" is in fact dated December 12, 1979. The December 21, 1979 referred to in the minutes is obviously a transposition of numbers. Further,

although the minutes of the meeting of the Board of Directors of All American indicate the meeting was held on December 13, 1979, the Directors authorized the letter dated December 12, 1979 attached as Exhibit "B" to the minutes. The dates in these various documents prepared by the Defendants disclose obvious discrepancies.

Thus, the jury had before it conflicting testimony and documents, and the absence of any legitimate business reason for the Post Trust stock purchase allegedly immediately prior to the tender offer. The jury resolved the conflict as to the facts in favor of the Plaintiffs, and the Court finds there was substantial evidence for the jury to so find.

FRAUD

The next contention of the Defendants is that there was no substantial evidence of trust and confidence by the Plaintiffs in the Defendants and the jury's finding of fraud and deceit in Issue No. 10 is inconsistent with its finding in Issue No. 3 that a reasonable shareholder could not have reasonably relied upon the omissions contained in the tender offer materials.

The Defendants argue that under North Carolina law there is no fiduciary relationship between the controlling shareholders on the one hand and the minority shareholders on the other. Granted, that although there is a fiduciary relationship between the directors and the shareholders in the operation of the corporation, it is doubtful that under North Carolina law there is a fiduciary relationship between the majority shareholders and the minority shareholders in a transaction involving purchase by the majority or controlling shareholders of the minority shareholders' stock, except under "special circumstances." *Lazenby v. Goodwin*, 40 N.C. App. 487, 253 S.E.2d 489 (1979), *aff'd in part, new trial on damages*, 60 N.C. App. 504, 299 S.E.2d 288 (1983).

In accordance with the law of North Carolina the Court instructed the jury that they could find a fiduciary relationship

existed in this tender offer, if they found the existence of special circumstances. Further, the specific issue answered by the jury was: "Was there a relationship of trust and confidence existing between the Plaintiffs and the Defendants in connection with the tender offer?"

Thus, the issue presented to the jury was not whether there was a fiduciary duty by the majority shareholders to the minority shareholders as a general proposition but whether under the special circumstances of this case the shareholders to whom the offer was made trusted the offer from Defendants as purchasers who had complete knowledge of the company and its value would not do any act to mislead the shareholders to whom the tender offer was addressed. The jury found that there was this relationship which had been created by the circumstances surrounding the tender offer. The Court is of the opinion that in light of the lack of any viable market for the shares, the lack of any anticipated market for the shares, the lack of any dividend history, the lack of the Plaintiffs' financial experience compared to the financial expertise of the Shaw Group and the fact that the majority controlling shareholder initiated the purchase, there was sufficient evidence for the jury to make such a finding.

The Defendants argue that the jury's finding of fraud and deceit in Issue No. 10 is inconsistent with its findings in Issue No. 3 that disclosure of omitted material facts would not have had actual significance in the deliberations of a reasonable shareholder as to whether to sell his interest in All American. In Issue No. 10, the jury was saying the *Defendants* purchased the Post Trust stock with intent to defraud the minority shareholders which the jury already found in Issue No. 7 was an affirmative act done with intent to defraud the minority shareholders. There was sufficient evidence for the jury to make such a finding.

Finding in Issue No. 3 that inclusion of specified material facts which facts were omitted from the tender offer would not have had any significance to a reasonable tendering shareholder is clearly different from a violation of a trust and confidence which the jury found these tendering shareholders had in the Defendants. The Court, therefore, finds there is not an irreconcilable conflict between the jury's answer to Issue No. 3 and the finding of fraud and deceit in answer to Issue No. 10.²

DAMAGE

The Defendants contend that the jury's finding of \$10.28 per share in damages cannot be supported by the evidence. The essence of the Defendants' argument is that \$10.28 per share is invalid because it is only the value of a share when a control premium is obtained.

The value of the stock was a question for the jury. The Court instructed the jury that the damages would be the difference between the value received (\$5.00) and what the Plaintiffs proved by a preponderance of the evidence was the value of the shares at the expiration of the tender offer. The jury found the difference to be \$5.28 per share. The Court is of the opinion that there was substantial evidence, including Mr. Shaw's own testimony in his deposition, from which the jury could make such a finding.

In light of the above the Court is of the opinion that the Defendants' Motion for Judgment Notwithstanding the Verdict or alternatively for New Trial should be denied.

IT IS, THEREFORE, ORDERED that:

(1) The Defendants' Motion for Judgment Notwithstanding the Verdict or alternatively for New Trial is ***DENIED***;

² As a procedural matter the Court notes for the record that the Defendants did not object to the instructions or the issues submitted to the jury concerning the common law fraud claim.

(2) The Administrator shall proceed with distribution of Notice of Judgment to class members in accordance with the Order of May 21, 1985; and

(3) The date to be inserted in the Proof of Claim is "October 4, 1985".

This the 21st day of August, 1985.

/s/ ROBERT D. POTTER

Robert D. Potter, *Chief*
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-2000

City National Bank, as Executor of the estate of John S. Cansler, deceased; Nell V. Bates; Anna Pender Griffith; Virginia T. Johnson; Lacy D. Keesler; S. Dewey Keesler, A. H. Kimball; H. Brown Kimball; Ann Dupree King; Rose Dupree King, deceased; John D. King; Marie Dowd Latimer; T. F. Morgan; Grace E. Morgan; Mary Rogers Pender Murphy; Ludie B. Parker; John Robert Pender, III; John Robert Pender, IV; Mary D. Pender; W. L. Pender; Gaylord Myers Pender; Deborah Grace Speece; Oliver Brown Thomas; Charles Nixon White; Doris Haire White; Rogers Pender Williams; All American Assurance Co.; and William Shecter, *Appellees,*

versus

American Commonwealth Financial Corp.;
Great Commonwealth Life Insurance Co.;
and Robert T. Shaw, *Appellants.*

No. 85-2147

City National Bank, as Executor of the estate of John S. Cansler, deceased; Nell V. Bates; Anna Pender Griffith; Virginia T. Johnson; Lacy D. Keesler; S. Dewey Keesler; A. H. Kimball; H. Brown Kimball; Ann Dupree King; Rose Dupree King, deceased; John D. King; Marie Dowd Latimer; T. F. Morgan; Grace E. Morgan; Mary Rogers Pender Murphy; Ludie B. Parker; John Robert Pender, III; John Robert Pender, IV; Mary D. Pender; W. L.

Pender; Gaylord Myers Pender; Deborah
Grace Speece; Oliver Brown Thomas;
Charles Nixon White; Doris Haire White;
Rogers Pender Williams; All American As-
surance Co.; and William Shecter, *Appellants*

versus

American Commonwealth Financial Corp.;
Great Commonwealth Life Insurance Co.;
and Robert T. Shaw, *Appellees.*

Appeals from the United States District Court for the Western
District of North Carolina, at Charlotte. Robert D. Potter,
Chief Judge. (CA 82-0482-P)

Argued: May 6, 1986

Decided: September 25, 1986

Before HALL and ERVIN, Circuit Judges, and BUTZNER,
Senior Circuit Judge.

G. Richard Poehner (George R. Poehner; William F. LePage;
Moore & Patterson [sic]; Jimmy H. Barnhill; Womble, Carlyle,
Sandridge & Rice on brief) for Appellants/cross-appellees;
Thomas Ashe Lockhart (Bruce M. Simpson; Cansler & Lock-
hart, P.A. on brief) for Appellees/cross-appellants.

BUTZNER, Senior Circuit Judge:

American Commonwealth Financial Corp., Great Commonwealth Life Insurance Co., I.C.H. Corp., and Robert T. Shaw appeal a judgment entered on the verdict of a jury awarding damages to minority shareholders of All American Assurance Co. who sold their shares to Great Commonwealth Life Insurance Co. in response to a tender offer. The appellants assert that the evidence was insufficient to find a violation of Securities Exchange Commission Rule 10b-13 [17 C.F.R. § 240.10b-13] or common law fraud. They also protest that the damages improperly reflected a control premium¹ for the tendered stock.

The minority shareholders assign error to the district court's ruling that they cannot recover either treble damages and attorney fees pursuant to North Carolina's Unfair Trade Practices Act, N.C. Gen. Stat. 75-1.1 (1985), or rescissionary damages based on the value of the shares at the time of judgment.

The district court addressed all of the contentions raised on appeal and cross-appeal fully explaining its reasons for rejecting them. We affirm.

I

In January 1979, American Commonwealth Financial Corp. acquired 67% of All American's stock from American Bank and Trust Company. American Commonwealth subsequently transferred this stock to its wholly owned subsidiary, Great Commonwealth Life Insurance Co. Robert T. Shaw was president of American Commonwealth and a director of Great Commonwealth. He became president of All American after its acquisition.

¹ "[T]he value of a controlling position in a corporation is worth more on a per share basis than a non-controlling interest." *Alna Capital Associates v. Wagner*, 758 F.2d 562, 566 (11th Cir. 1985). This enhanced value is termed a control premium.

On December 14, 1979, Great Commonwealth made a tender offer for 175,000 shares of All American at \$5 a share. Prior to the tender offer, Great Commonwealth arranged to purchase 57,782 shares of All American stock at \$5 a share, including 18,500 shares from the Post family trusts. These private purchases were disclosed in the tender offer. The tender offer expired on January 4, 1980, and enabled Great Commonwealth to increase its holdings in All American to over 80% of its stock. In November 1982, All American merged with I.C.H. Corp., and the shareholders of All American exchanged their stock for shares of I.C.H.

In August 1982, several minority shareholders brought this class action on behalf of those shareholders who sold their All American Stock to Great Commonwealth pursuant to the December 1979 tender offer. They claimed that the defendants made material misrepresentations and omissions in the tender offer in violation of Rule 10b-5. 17 C.F.R. § 240.10b-5 (1986). They introduced evidence to show that the private purchase from the Post trusts was made after the commencement of the tender offer in violation of Rule 10b-13. 17 C.F.R. § 240.10b-13 (1986). In addition, they claimed that the defendants committed fraud and breached their fiduciary duties. As a result, the minority shareholders charged that they were misled into selling their stock for \$5 a share, a price far below its actual value. They sought compensatory and punitive damages, as well as treble damages and attorneys fees under North Carolina's Unfair Trade Practices Act. They also sought to recover rescissory damages measured by the value of I.C.H. stock at the time of judgment.

In response to special interrogatories the jury found no violation of Rule 10b-5 because any omissions in the tender offer would not "have had actual significance in the deliberations of a reasonable shareholder." The jury found that the purchase of the Post stock violated Rule 10b-13. In addition, it found that this purchase was made with the "intent to deceive,

manipulate or defraud" the minority shareholders. The jury also found that the defendants committed fraud in connection with the purchase of the minority shareholders' stock. The jury determined that a relationship of trust and confidence existed between the minority shareholders and defendants and that the defendants were guilty of a breach of fiduciary duties. The jury awarded \$5.28 a share in damages. During the course of the proceedings the district court denied the minority shareholders recovery under the Unfair Trade Practices Act and their claim for rescissionary damages. After denying the defendants' motions for judgment notwithstanding the verdict and for a new trial, the district court entered judgment on the verdict in favor of the minority shareholders.

II

The defendants contend that evidence is not sufficient to support the jury's finding that the purchase of the Post stock violated Rule 10b-13, which prohibits private purchases after the announcement of a tender offer.²

Great Commonwealth entered into a stock purchase agreement on December 11, 1979, for the Post stock. The agreement required Great Commonwealth to pay 5% of the purchase price at the closing on December 12, with the balance due on January 2, 1980. One of the defendants' witnesses testified that the stock certificates were transferred to the defendants on December 12. The defendants contend that this evidence

² Rule 10b-13, 17 C.F.R. § 240.10b-13 (1986), provides:

No person who makes a cash tender offer or exchange offer for any equity security shall, directly or indirectly, purchase, or make any arrangement to purchase, any such security (or any other security which is immediately convertible into or exchangeable for such security), otherwise than pursuant to such tender offer or exchange offer, from the time such tender offer or exchange offer is publicly announced or otherwise made known by such person to holders of the security to be acquired until the expiration of the period, including any extensions thereof, during which securities tendered pursuant to such tender offer or exchange offer may by the terms of such offer be accepted or rejected.

establishes, as a matter of law, that they acquired ownership of the Post stock on December 12, two days before the public announcement of the tender offer.

The district court properly ruled that pre-tender private purchases are not covered by Rule 10b-13 although they are still subject to the general antifraud provisions of the Securities Act. *See* *Sunshine Mining Co. v. Great Western United Corp.*, [1977-1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,049 (D. Idaho Apr. 22, 1977); *Heine v. Signal Companies, Inc.*, [1976-1977 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,898 (S.D.N.Y. Mar. 4, 1977).

The minority shareholders presented evidence that Great Commonwealth did not pay 5% of the price of the stock on December 12 as required by the purchase agreement. Instead, payment was made after December 17. This raised the issue whether the parties intended to transfer ownership of the stock on December 12 or at the time Great Commonwealth made the initial payment. The court properly submitted this issue to the jury.

In its opinion denying the motion for judgment notwithstanding the verdict, the district court carefully reviewed the evidence pertaining to the date of the purchase of the Post stock. The district court pointed out that ample circumstantial evidence existed for discrediting the witness's testimony that the shares were delivered and the sale closed on December 12. Not until December 17 did Great Commonwealth's lawyer direct an official of the company to pay the initial 5% of the purchase price. No explanation was given for this delay, and the jury could draw the reasonable inference that a prudent lawyer would not direct his client to pay for stock until the shares were in hand. The district court noted discrepancies in the dates of pertinent documents and the lack of any valid, credible business reason for the private purchase of the Post shares. The district court also pointed to a business relationship between Shaw and Post. Post owned a substantial amount of I.C.H. stock.

Through its holdings in Ozark National Life Insurance Co., I.C.H. had a substantial interest in American Commonwealth Financial Corp. which owned 100% of Great Commonwealth, the purchaser of the Post stock. As the district court observed, the jury could reasonably find that the purchase from Post of a large block of stock at \$5 a share was made to influence the minority shareholders to sell to Great Commonwealth at this price.

We reject Great Commonwealth's argument that it did not violate Rule 10b-13 because it became the beneficial owner of the Post stock upon entering into the stock purchase agreement. It is the purchase of stock that Rule 10b-13 regulates, not the claim to beneficial ownership. Moreover, the stock purchase agreement did not purport to convey beneficial ownership of the stock on December 11, the date of its execution. Instead, it specifically provided that the stock would be delivered and 5% payment made at the closing. Therefore, Great Commonwealth's status as a party to an executory contract to purchase stock in the future does not immunize it from application of Rule 10b-13.

We also reject the defendants' argument that Texas law establishes that Great Commonwealth became the owner of the Post stock at the time the stock certificates were delivered. Reliance on this provision of Texas law does not resolve the question. The contract provided that delivery and 5% payment were to be made simultaneously. The date on which this took place raised a factual question that the jury resolved against the defendants.

The defendants also contend that the evidence is insufficient to sustain the jury's finding of common law fraud. They particularly challenge the jury's findings that there was a relationship of trust and confidence between the minority stockholders and the defendants and that the defendants practiced fraud and deceit, which was a proximate cause of

damage to the minority shareholders. The defendants contend that a finding of common law fraud is inconsistent with the jury's answer to interrogatory 3 in which it found that the disclosure of omitted material facts in the tender offer would not have had actual significance in the deliberations of a reasonable shareholder as to whether to sell his stock.

We agree with the district court that under North Carolina law the evidence was sufficient for the jury to find a relationship of trust and confidence between the minority shareholders and the defendants. *See Lazenby v Goodwin*, 40 N.C. App. 487, 253 S.E.2d 489 (1979), *aff'd on retrial remanded for damages*, 60 N.C. App. 504, 299 S.E.2d 288 (1983). For reasons adequately explained by the district court in its opinion denying the motion notwithstanding the verdict, we conclude that there is no inconsistency in the jury's answers to the interrogatories and that the evidence is sufficient to sustain the jury's finding of fraud and deceit. Special interrogatory 3 referred to a number of alleged omissions in the tender offer. These, however, were quite distinct from the affirmative acts pertaining to the purchase of the Post stock with the intent to create the false impression that \$5 was a reasonable price.

The defendants contest the amount of damages that the jury awarded. In computing damages, the jury was required to determine the value of the plaintiffs' stock at the time of the tender offer in December 1979. The jury determined that the stock was worth \$10.28 a share, which is the same price that American Commonwealth paid when it acquired a controlling block of All American stock in January 1979. The defendants contend that the jury's measure of damages must be set aside because it awarded the minority shareholders a control premium for their minority interest in All American.

Shaw stated in his deposition that \$10.28 a share was a bargain price to pay for a controlling block of All American stock. He testified that he would have paid more. The jury

could interpret his testimony to mean that a controlling interest was worth more than \$10.28 a share in January 1979. In addition, the minority shareholders' expert testified that the minority interest was worth \$14.63 a share in December 1979. Therefore, the jury could reasonably find that the value of the stock in December 1979 was \$10.28 a share, even though the shareholders had a minority interest. Accordingly, the jury's award of damages is supported by the evidence.

Both a trial court and an appellate court are subject to stringent limitations when they consider a motion for judgment notwithstanding the verdict. See 9 Wright & Miller, *Federal Practice and Procedure* § 2524 (1971). Measured by these familiar restrictions, the evidence was sufficient to sustain the verdict, and the district court did not err by denying the defendants' motion.

III

In their cross-appeal, the minority shareholders assign error to the district court's ruling that because the North Carolina Unfair Trade Practices Act, N.C. Gen. Stat. 75-1.1, does not apply to securities transactions, they cannot recover treble damages and attorney fees. They contend that the Act applies because the jury found common law fraud and breach of fiduciary duty in addition to a violation of Rule 10b-13.

The district court correctly anticipated the North Carolina Supreme Court's construction of the Act. In a case decided after the district court's ruling, the Supreme Court held that the Act did not apply to securities transactions. Significantly the plaintiffs in that case alleged fraud, constructive fraud, and misrepresentation. See *Skinner v. E. F. Hutton & Co*, 314 N.C. 267, 269, 274-75, 333 S.E.2d 236, 238, 241 (1985).

We also agree with the district court that the minority shareholders' undue delay in making a demand and their

failure to mitigate their damages forecloses their claim for the rescissionary damages that they sought to compute as of the date of the judgment. *See S.E.C. v. McDonald*, 699 F.2d 47, 53 (1st Cir. 1983); *Baumel v. Rosen*, 412 F.2d 571, 574-76 (4th Cir. 1969); *Miller v. Miller*, 273 N.C. 228, 239, 160 S.E.2d 65, 73-74 (1968); *Bruton v. Bland*, 260 N.C. 429, 430, 132 S.E.2d 910, 911 (1963).

The judgment of the district court is affirmed.

U.S. Const. amend. VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

§ 240.10b-13 Prohibiting other purchases during tender offer or exchange offer.

(a) No person who makes a cash tender offer or exchange offer for any equity security shall, directly or indirectly, purchase, or make any arrangement to purchase, any such security (or any other security which is immediately convertible into or exchangeable for such security), otherwise than pursuant to such tender offer or exchange offer, from the time such tender offer or exchange offer is publicly announced or otherwise made known by such person to holders of the security to be acquired until the expiration of the period, including any extensions thereof, during which securities tendered pursuant to such tender offer or exchange offer may by the terms of such offer be accepted or rejected: *Provided, however*, That if such person is the owner of another security which is immediately convertible into or exchangeable for the security which is the subject of the offer, his subsequent exercise of his right of conversion or

exchange with respect to such other security shall not be prohibited by this section.

(b) The term "exchange offer" as used in this section shall include a tender offer for, or request or invitation for tenders of, any security in exchange for any consideration other than for all cash.

(c) The provisions of this section shall not apply to a purchase of a security of the same class as that which is the subject of a cash tender offer or exchange offer (or of any other security which is immediately convertible into or exchangeable for such security) if such purchase is made by the issuer, by participating employees of the issuer or the employees of its subsidiaries, or by the trustee or other person acquiring such security for the account of such employees, pursuant to (1) a stock option plan involving only "qualified stock options" or qualifying as an "employee stock purchase plan" as those terms are defined in sections 422 and 423 of the Internal Revenue Code of 1954, as amended, or "restricted stock options" as defined in section 424(b) of the Internal Revenue Code of 1954, as amended: *Provided, however,* That for the purposes of this paragraph an option which meets all of the conditions of that section other than the date of issuance shall be deemed to be "restricted stock options"; or (2) a savings, investment, pension or other stock purchase plan providing for both (i) periodic payments (or payroll deductions) for acquisition of securities by or on behalf of participating employees and (ii) periodic purchases of the securities by participating employees, or the person acquiring them for the account of such employees.

(d) This section shall not prohibit any transaction or transactions if the Commission, upon written request or upon its own motion, exempts such transaction or transactions, either unconditionally or on specified terms or conditions, as not constituting a manipulative or deceptive device or contrivance or a fraudulent, or deceptive or manipulative act or practice comprehended within the purpose of this section.

